reports about Diamond from her subordinates. Stober subjected Diamond to a review outside of Colonial's policies. Diamond noticed that her phone sounded strange, and emailed Stober, asking if her calls were being monitored. He denied it, and referred her to maintenance personnel, claiming the phone must be malfunctioning. Now, Stober admits that he was having Diamond's phone monitored. Colonial sent a tech, ostensibly to wipe her computer clean of prior emails after she had made a report of discrimination, which was counter to company policy prohibiting the erasure of electronic email which might be the subject of litigation in the future. As a result of the erasure, Diamond was later unable to find a report that Stober asked her to produce. In March of 2002, Stober gave Diamond an annual review which was far below the levels of her prior reviews. For the lowest score given, Stober made it clear that he had given her the low score because he felt she did not follow the advice of management. The only advice of management that she had failed to follow had been when she had opposed Stober's decision to retaliate against Dee Goodman. As a result of the retaliatory hostile work environment, Diamond had begun to suffer from severe stress, anxiety and depression. On May 29, 2002, unable to bear the continued retaliatory harassment, she resigned from Colonial, and accepted a job at the South Carolina Budget and Control Board.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE TO DECIDE WHETHER THE MCDONNELL DOUGLAS SHIFTING BURDEN TEST CAN BE APPLIED TO A TITLE VII CASE, AS A DISPOSITIVE ANALYSIS TOOL, IN LIGHT OF THE 1991 AMENDMENTS TO THE CIVIL RIGHTS ACT OF 1964.

THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE TO DECIDE WHETHER IT SERVES THE ENDS OF JUSTICE FOR THE COURT TO CHOSE TO IGNORE A PRIOR OBJECTION FILED BY A PARTY, AND TAKE THE POSITION THAT THE MATTERS OBJECTED TO PREVIOUSLY ARE ABANDONED, WHERE THEY WERE CLEARLY NOT.

THE COURT SHOULD GRANT CERTIORARI IN THIS CASE TO DETERMINE WHETHER PROOF OF PRETEXT ON THE EMPLOYER'S PART AS TO THE REASON FOR AN ADVERSE EMPLOYMENT ACTION GIVES RISE TO AN INFERENCE OF DISCRIMINATORY INTENT.

I. The lower Courts erred in refusing to consider Diamond's objections and evidence concerning her retaliation claims.

Judge McCrorey, the Magistrate, issued a Report and Recommendation, recommending that Diamond's claims under Title VII and 42 U.S.C. 1981 alleging retaliation be dismissed. Diamond timely submitted an Objection, in which she specifically objected to the findings on the retaliation issues. That Objection also contained a discussion of Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003). Judge Anderson then issued an Order, noting that he had recently read a draft of a law review article which agreed with Diamond's position (that the McDonnell Douglas shifting burden test was no longer good law). Judge Anderson remanded the action to the Magistrate for further briefing and "a new Report and Recommendation in light of the *Desert Palace* decision." Judge McCrorey then issued an Order for the parties to submit briefs specifically addressing Desert Palace, and three other cases interpreting the Desert Palace decision.

As ordered, the briefs included argument **only** on the impact of the Desert Palace decision on Title VII analysis at Summary Judgment. Judge McCrorey then issued another R&R, on June 10, 2004. On the first page, the Judge writes "The Honorable Joseph F. Anderson, Jr., Chief United States District Court Judge, remanded the case to the undersigned for consideration of the Plaintiff's objections relating to the Desert Palace decision."

This statement was followed by a footnote, which read "The undersigned will not further address the analysis and conclusions reached in the original R&R." If one is to take Judge Anderson's Order at face value, and read it as abolishing, in its entirety, the first R&R, to be replaced by a new one, then Judge McCrorey, in this footnote, seems to be disobeying Judge Anderson's Order, by refusing to submit a "new" R&R, and deciding, instead, only to address the *Desert Palace* issue. The original R&R was the only one which responded to the Retaliation issues. The June 10th R&R does not mention that issue... at all. Colonial did not submit any objection to the Magistrate's failure to rule on the retaliation issue in the second R&R. Diamond did not address the retaliation issue in her Objection to the June 10th R&R because there were no findings or recommendations other than the note stating that those issues would not be addressed.

Judge Anderson attempts to justify dismissing Diamond's retaliation claims by stating that he assumes that the Plaintiff intended to abandon this issue since she did not mention it in the second Objection. The 4th Circuit agrees. However, there was nothing in the June 10th R&R, concerning retaliation, to which Diamond could have objected. Rule 72 allows the District Court Judge to alter, amend, or remand an issue after a Report and Recommendation upon the filing of a specific objection. Rule 72(b) FRCP. The failure to mention retaliation leave the issues intact.

The real problem here, is that Judge

McCrorey did not do what Judge Anderson ordered him to do. He was supposed to issue a "new" Report and Recommendation. Instead, he chose to restrict his R&R to one issue, noting this in a footnote. This left Diamond with limited options for an Objection. Logically, one can only object to recommendations that have been made. Diamond objected to the specific portions of the R&R which were detrimental to her case, the analysis of the race claim as failing at the prima facie stage, and the Magistrate's use of the shifting burden test to dispose of all the rest of the claims (the retaliation claims). Rule 72 calls for "specific, written objections to the proposed findings and recommendations" Rule 72, FRCP What is the Plaintiff to do when the Judge states, categorically, that he is not going to make any findings on a certain issue? There is nothing to object to. How can this be interpreted as an indication that Diamond has chosen to abandon her claims? The Fourth Circuit's stance on this issue is incorrect and does not do justice to the litigants in this case. It has Diamond pay for Judge McCrorey's decision not to comply with Judge Anderson's order, which left Diamond in an impossible situation. The Appellate Court's decision to find that Diamond meant to abandon a strong claim for retaliation is even more objectionable by the fact that Diamond made it blatantly clear that she *did* want to pursue this action through her earlier brief and objection concerning the issue when it was actually considered by the Magistrate. The Court should not go out of its way to dismiss cases at

Summary Judgment, especially when, to do so requires that the record be ignored or read to the exclusion of common sense.

II. As a result of the 1991 amendments to the Civil Rights Act of 1964, All Title VII cases are to be analyzed as mixed motive cases, and the McDonnell Douglas Shifting Burden test is no longer a tool which can be used to dismiss a Title VII case at the Summary Judgment stage.

A. The 1991 amendments to Title VII specifically require a mixed motive analysis of all Title VII cases.

The Fourth Circuit, in this Published Opinion, clearly states that the Shifting Burden test is alive and well. As the shifting burden test is only used in single motive cases, this means that the Fourth Circuit is still making a determination, at the beginning of the Summary judgment analysis, as to whether the Plaintiff ahs provided direct or circumstantial evidence of discrimination, putting the higher burden of proof on the Plaintiff who has not provided direct evidence of discrimination. This is exactly what the Desert Palace Decision recognizes as a violation of Congressional mandate from the 1991 amendments to Title VII.

In the decision from the Supreme Court in Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003), makes it clear that, as of June of 2003, all Title VII

cases are to be analyzed as mixed motive cases. In Desert Palace, the United States Supreme Court recognized and analyzed the 1991 amendment to the Civil Rights Act of 1964, which added sections 42 U.S.C. 2000e-2(m) and section 42 U.S.C. 2000e-5(g)(2)(B). The Court acknowledges that the statutory language found in those two sections is clear and unambiguous, and explains how those sections were supposed to have been applied. The 1991 amendment came shortly after a strangely divided opinion in PriceWaterhouse v Hopkins, 40 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) left the Courts with a framework under which the Plaintiff had to produce direct evidence of discrimination to continue on with a case based on prima facie proof only. Without direct evidence (basically, an admission from the Defendant) the Plaintiff was required to make a circumstantial case, thus, the elements necessary to prove prima facie cases by circumstantial evidence alone were developed. The "shifting burden test" was developed in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973), which not only required direct evidence to permit the Plaintiff to proceed with a mixed-motive case, but also granted the Defendant the right to overcome a successful prima facie case of discrimination by throwing out as many marginally believable reasons for the adverse employment action as it could think of, whether the reasons were true or not. In other words, in cases in which the Plaintiff had actually produced evidence from which a reasonable juror could find that the decision to take adverse

employment action was motivated by discriminatory considerations, the Judge could ignore that fact and dismiss the whole case as long as the Defendant introduced an unsupported articulation which the Plaintiff could not specifically disprove.

The Supreme Court, in the Desert Palace Opinion, did not so much make a new ruling, as it pointed out that many Courts did not change their standards for analysis when Congress changed the clear language of Title VII. In the Desert Palace opinion, the Court discusses two sections of the amendment. The first, 42 U.S.C. 2000e-2(m), provides, among other things, that an unlawful employment practice is established "when the complaining party demonstrates that …race…was a motivating factor for any employment practice, even thought other factors also motivated the practice." When read plainly, this section says a Plaintiff can prove a prima facie case under Title VII by simply showing evidence from which a reasonable juror could find that an protected characteristic of the Plaintiff was considered as part of the reason for any employment decision (not just adverse employment actions, either). This simply does not mesh with the standards that the Courts have been applying, requiring direct proof for a mixed motive case, and setting up series of individual elements to be proven piecemeal in order to establish circumstantial cases. The Court very clearly explains that, if circumstantial evidence is good enough to prove a criminal case,. in which the State has a "beyond a reasonable

doubt" standard of proof and is seeking to impair the constitutional rights of a citizen, then there is no reason why a Civil Rights Plaintiff should be restricted from using the same type of evidence to prove a civil case.

B. The "shifting burden" analysis is actually an affirmative defense, which does not impact on liability, and can not be used as a basis for dismissal of a Title VII case.

The second amendment that the Court discusses in Desert Palace is 42 U.S.C. 2000e-2(m). This one clearly spells out how the shifting burden test is ***supposed*** to be used. Congress has clearly stated that the burden that shifts to the employer requires the employer to "demonstrate" (or produce evidence sufficient to create a genuine issue of material fact) a reason for the adverse action that was not related to any protected characteristic of the Plaintiff, and then pursue it as an affirmative defense. The statutory language specifically calls it an "affirmative defense." 42 U.S.C. 2000e-5(g)(2)(B). The statute mandates that, even if a Defendant successfully proved that it had a non-discriminatory reason for an adverse employment action the result would not be dismissal of the case. Instead, a successfully proven affirmative defense would entitle the Defendant to a limitation of damages, but does not absolve the Defendant of liability.

> "the employer has a limited affirmative action defense that does not absolve it of

liability, but restricts the remedies available to the Plaintiff. The available remedies include only declaratory relief, certain types of injunctive relief, and attorney's fees and costs." 42 U.S.C. 2000e-5(g)(2)(B).

C. Hill v. Lockheed Marin Logistics Management, the Fourth Circuit.

The Fourth Circuit, in the Opinion on which the Petitioner hereby requests review, challenges Petitioner's reading of the first 4th Circuit case regarding the Desert Palace decision, asserting that the shifting burden test is alive and well for Title VII cases despite the Supreme Court's ruling and the clear language of the 1991 amendments. In Hill v. Lockheed Marin Logistics Management, ___ F.3d ___, 2004 WL 25018 (4th Cir. 2004), however, the 4th Circuit appears to recognize that the 1991 amendments *were* specifically designed to overrule the Price Waterhouse v. Hopkins opinion, which formed the pedestal for the Shifting burden test. (see section III A of the Hill opinion, Hill v. Lockheed Martin Logistics Management, Inc., __ F.3d __, 2004 WL 25018 (4th Cir. 2004).)

> Generally speaking, a plaintiff may avert summary judgment and establish a claim for intentional sex or age discrimination through two avenues of proof...
>
> First, a plaintiff may establish a claim of

discrimination by demonstrating through direct or circumstantial evidence that sex or age discrimination motivated the employer's adverse employment decision. The employee, however, need not demonstrate that the prohibited characteristic was the sole motivating factor to prevail, so long as it was a motivating factor.

The second method of averting summary judgment is to proceed under a "pretext" framework, under which the employee, after establishing a prima facie case of discrimination, demonstrates that the employer's offered permissible reason for taking an adverse employment action is actually a pretext for discrimination. See Texas Dep't Comm. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973).
Hill v. Lockheed Marin Logistics Management, ___ F.3d ___, 2004 WL 25018 (4th Cir. 2004).

If meeting ***either*** standard will allow the Plaintiff to avert Summary Judgment, then the establishment of a prima facie case of discrimination should be sufficient, and the shifting burden test may not be applied, at least in Title VII cases.

II. The record contained no genuine issue of material fact concerning whether the Plaintiff had established a prima facie case of discrimination.

Judge Anderson, and the Fourth Circuit found that Diamond had satisfied all of the elements of proving a circumstantial case of race discrimination as to the denial of promotion to A&H Manager except for showing that she was more qualified than Ms. Scott, the white lady who had received the promotion. It should be noted, however, that Judge Anderson did admit that "there is simply no basis to conclude that Scott was more qualified for the position than Diamond." The evidence in the record does present a genuine issue of material fact (at the very least) as to Diamond's being head and shoulders above Scott in every respect concerning qualifications for the job. Beyond that, Colonial's attempt to claim that Diamond did not have "management" experience before coming to Colonial, as it basis for finding that she was less experienced than Scott, is shown, by Colonial's own records to be a blatant lie... which the Court simply ignores, counter to the holding from Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000).

Diamond was the only candidate for the A&H Manager position who was actually qualified to apply for the position, at all, without requesting special consideration to override Colonial's personnel policies. Colonial's written

policies required internal applicants for open positions to have been in their former position for at least 18 months prior to applying for another. As Diamond was the only applicant who was actually qualified under Colonial's policies, to apply for the position, absent a special waiver from management, that should be considered evidence that she was more qualified than the other applicants to begin with. Diamond was qualified, "as is" and the other candidates all had to get some special permission even to apply. This is evidence from which a reasonable juror could find that Diamond was the most qualified for the job, and that Colonial chose to "bend the rules" to allow white applicants to compete with her, when, except for the special consideration, they would not even have been in the applicant pool.

Colonial has the right to list the qualifications for any job for which it is hiring. In this case, Colonial listed "college degree preferred" Diamond was the only applicant who had a college degree. She even had a Masters degree. Her degree was in merchandising, which included marketing and sales (an understanding of Colonial marketing and sales was another listed qualification). As Diamond had one, and nobody else in the applicant pool did, this should be considered evidence from which a reasonable person could find that Diamond was the most qualified of the group, and more qualified than Scott.

The listing of qualifications for the A&H manager position also lists that management

experience is "preferred." Colonial makes the semantic argument that, when Diamond ran a retail store, under the title of supervisor, she was not really considered to have been gaining "management" experience. The 4th Circuit adopts this view, despite clear evidence to the contrary. Colonial's representative could not remember what management experience Scott had, and Colonial refused to produce her application. The record, however, shows that Scott was a pharmacy technician whereas Diamond supervised a retail store. The documentary evidence from Colonial's own files prove that it has made a pretextual assertion to the Court on this matter. Diamond's personnel file contains a form filled out by Colonial's personnel department, apparently after an interview with Diamond. The form clearly identifies Diamond as having one year of experience in a category marked "326." Category 326 is noted, on the form, as representing "management" experience. On top of this, in an earlier evaluation, Hamrick had specifically noted that Diamond stood out for taking on senior responsibilities when she was a specialist. There is no evidence that Scott, or any other applicant had equal management experience either in or outside of Colonial. There is a genuine issue of material fact as to this issue.

A. **Under Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000), Colonial's pretextual claim that it did not recognize Ms. Diamond's prior experience as**

management experience should be considered evidence of discriminatory intent.

Although Diamond presented this issue, and the documentary evidence (created and produced by Colonial, no less) clearly in her brief in response to Colonial's Motion for Summary Judgment , it seems to have been blatantly ignored by the Courts below. Colonial claimed that it did not recognize Diamond's prior experience in managing a store as "management" experience, whereas it claimed that Ms. Scott's former title of pharmacy technician (Judge Anderson says "office manager, but there is no evidence to support this) implied management experience. Colonial, and Judge Anderson both state that there is simply no evidence that Diamond came to colonial with any management experience. Specifically, he states that Diamond had "been a retail supervisor (but not a manager) before coming to Colonial Life." How can the Judge claim that there is no genuine issue of material fact on this issue when Diamond's brief contains direct evidence showing that Colonial, itself, considered her to have a year of management experience? He can not, and neither can the 4th Circuit, unless they simply have decided to ignore any evidence which supports Diamond's case.

During discovery, though Colonial refused to produce Scott's personnel file, it did produce its own records concerning Ms. Diamond's application. One document included a page filled

out by Colonial's employees. It notes one experience in a category marked "326." A key on the form notes that 326 stands for "management." Not only has the Fourth Circuit fail to recognize this obvious genuine issue of material fact, but Colonial has been exposed as presenting a pretextual reason for denying Ms. Diamond's application for the Accident and health Manger position.

In Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000), the U.S. Supreme Court recognized that, where the Defendant/ employer is caught presenting a pretextual reason for an adverse employment action, the Court can consider the attempt to get away with the lie to be evidence of discriminatory intent on the employer's part.

> "Under this commonsense principal, evidence suggesting that a defendant accused of illegal discrimination has chosen to give a false explanation for its actions gives rise to a rational inference that the defendant could be masking its actual illegal motivation" Whether the employer "was in fact motivated by discrimination is of course for the finder of fact to decide." Id.

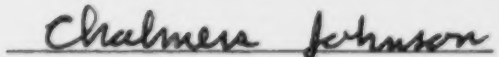
The 4th Circuit, in this case, erred, both in failing to recognize the glaring genuine issue of material fact presented by the form, and in failing to resolve the inference of discriminatory intent created by

Colonial's pretextual stance on the issue in Diamond's favor, as is required a the Summary Judgment stage. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

CONCLUSION

For the reasons set forth above, Petitioner ROVILMA DIAMOND respectfully prays that the Court grant a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fourth Circuit in this case.

Respectfully Submitted,



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No.

IN THE SUPREME COURT OF THE UNITED STATES

ROVILMA DIAMOND,

Petitioner,

v.

COLONIAL LIFE & ACCIDENT INSURANCE COMPANY

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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APPENDIX
Rule 14(i)

Rule 14 (i)(i) Opinions, Orders, Findings of fact and conclusions of law entered in conjunction with the judgment sought to be reviewed

Order of August 4, 2004, U.S. District Court .. .1

Published Opinion, 4th Circuit Court of Appeals, July 25, 2005. 11

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

ROVILMA DIAMOND,

Plaintiff-Appellant,

v.

No. 04-2093

COLONIAL LIFE & ACCIDENT INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Joseph F. Anderson, Jr., Chief District Judge. (CA-02-1412-03-17BC)

Argued: May 24, 2005 Decided: July 25, 2005

Before WIDENER and MOTZ, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by published opinion. Judge Motz wrote the opinion, in which Judge Widener and Senior Judge Hamilton joined.

COUNSEL

ARGUED: Chalmers Carey Johnson, Charleston, South Carolina, for Appellant. Katherine Dudley Helms, OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C., Columbia, South Carolina, for Appellee. **ON BRIEF:** William L. Duda, OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C., Columbia, South Carolina, for Appellee.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

Rovilma Diamond sued her former employer, Colonial Life & Accident Insurance Company, alleging race discrimination and retaliation in violation of Title VII of the Civil Rights Act and 42 U.S.C.A. § 1981 (West 2003). For the reasons that follow, we affirm the order of the district court granting Colonial summary judgment on both claims.

Shortly after graduating from Hampton University in 1992 with a degree in merchandising, Diamond, an African-American woman, began working at Colonial as a customer service specialist. In 1995, Colonial promoted Diamond to the position of disability claims specialist. While working at Colonial, and with help from its academic assistance program, Diamond pursued a master's

degree in public administration, which she earned in 1998. Subsequently, Colonial promoted Diamond to the position of senior customer care specialist. In that role she reported to Randy Stober, a white man, who reported to Mike Glover, an African-American man and the assistant vice president of the claims department.

In the summer of 2000, three claims specialists — two African-American women (including Dee Goodman) and one white woman — applied to telecommute, i.e., work from home. Stober refused Goodman's request to telecommute, but granted the white woman's request even though she, unlike Goodman, had been disciplined a few months earlier. Following the denial of her request, Goodman "made an internal report of discrimination . . . and listed Diamond as a supporting witness." Brief of Appellant at 6.[1]

[1]Goodman ultimately resigned and sued Colonial for race discrimination and retaliation. The district court granted Colonial summary judgment in that case.

In August 2000, Glover posted an opening for a position as accident and health manager. Diamond and two white women asked to be considered for the position. Due to budget concerns, however, Glover did not fill the position at that time. In January 2001, Diamond began searching for other

employment.

In February 2001, Glover again posted the opening for accident and health manager. Glover informed Debbie Hamrick, a white woman and the director of accident and health and life claims, that Diamond and the two white women who had previously expressed interest in the position should be considered. In addition, Cindy Scott, a white woman, and four white men applied for the position. The stated qualifications for the position were: (1) "[p]rior management experience preferred," (2) "[c]ollege degree preferred, but will consider equivalent claims experience," and (3) "[u]nderstanding of Colonial Products, Services, Markets, etc." In addition, Colonial generally required an employee to have 18 months of work experience at Colonial in order to be eligible for a promotion, although this requirement could be waived if the employee was seeking a promotion within the same department.

Hamrick and Blanche Chisholm, an African-American woman who was an accident and health manager, interviewed six of the eight applicants, including Diamond and Scott. Following each interview, Hamrick and Chisholm rated the applicant on the basis of nine characteristics, such as "operations knowledge, business sense, decision making, communication skills, high degree of initiative, flexibility/openness, leadership skills, hands-on manager, and interpersonal skills." Hamrick and Chisholm agreed that, based on their rating system, Diamond

ranked fourth among the applicants while Scott ranked first. The contemporaneous notes of Hamrick and Chisholm indicate that they believed Diamond had strong communication skills and technical knowledge, but that she needed to develop "interpersonal skills, initiative, coaching/counseling." Although Scott lacked a college degree and had not worked for Colonial for eighteen months, Hamrick and Chisholm rated her higher than Diamond in all nine categories, noting her particular strength in "decision making, leadership, interpersonal skills, communication." After the interviews, Hamrick spoke with the managers of each of the top four applicants to discuss the applicants' ratings; none of the managers disagreed with the rank-

ings. Hamrick also discussed the rankings with Glover, who agreed with them. In March 2001, Colonial awarded the position to Scott.

Shortly thereafter, Diamond lodged internal complaints of race discrimination and retaliation. In April 2001, unsatisfied with Colonial's response, she filed a charge of discrimination with the South Carolina Human Affairs Commission. In response to that charge, Diamond claims, she "began to experience negative changes at work," including complaints about her work, being left unprepared for meetings, having her phone calls monitored and certain emails deleted, heightened surveillance, and negative performance reviews. Brief of Appellant at 10-12. On May 29, 2002, Diamond resigned from

Colonial and accepted a job with the South Carolina Budget and Control Board.

B.

On April 23, 2002, a month before resigning, Diamond filed a complaint in state court alleging wrongful denial of a promotion and retaliation in violation of Title VII and 42 U.S.C.A. § 1981. Colonial removed the case to federal court and moved for summary judgment.

On October 21, 2003, the magistrate judge issued a report and recommendation in which he recommended granting Colonial's motion for summary judgment on both the failure to promote and retaliation claims. Diamond timely filed an objection to the magistrate judge's report, specifically objecting to his disposition of both claims. Diamond also argued in her objection that the Supreme Court's recent decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), rendered the "shifting burden test . . . no longer . . . applicable" in Title VII cases at the "[s]ummary [j]udgment stage."

The district court ordered the magistrate judge to "take a fresh look" at Diamond's suit "in light of *Desert Palace.*" The court also directed the magistrate to order further briefing and issue a "new" report and recommendation. The magistrate promptly ordered the parties to file supplemental briefs. In Diamond's brief, she specifically addressed the impact of *Desert Palace* on her race

discrimination claim. As to her retaliation claim, she stated that she "requested] de novo consideration of the arguments set forth in the opposing memoranda and objection and response currently on file."

On June 10, 2004, the magistrate judge issued his second report and recommendation, in which he again recommended granting summary judgment to Colonial on Diamond's failure to promote claim. Regarding the retaliation claim, the magistrate judge erroneously said: "Although Diamond asks that summary judgment be reconsidered for both her claims (failure to promote and retaliation) in her objections to the [report and recommendation], she argues only that her failure to promote claim survive [sic] summary judgment in her most recent memorandum." For this (incorrect) reason, the magistrate judge concluded that "only Diamond's failure to promote claim will be addressed." Diamond timely objected to the magistrate's recommendation as to her failure to promote claim, but did not file an objection to the report's treatment of her retaliation claim.

The district court, after conducting a de novo review of Diamond's failure to promote claim, granted Colonial summary judgment on that claim. The court also granted Colonial summary judgment on Diamond's retaliation claim, but did not review the claim de novo review because the court concluded that Diamond had not preserved

an objection to the magistrate judge's resolution of that claim. The court explained:

> [I]n the June 10, 2004 [report and recommendation], the Magistrate Judge observed that although Diamond asked in her objections to the initial October 1, 2003 [report and recommendation] that summary judgment be reconsidered for both the discrimination and retaliation claims, in her most recent memorandum she argues only that her failure to promote claim survives summary judgment. This court notes that Diamond did not dispute that Magistrate Judge's observation in her response to the June 10, 2004 [report and recommendation] and thus this court adopts the reasoning contained in the initial [report and recommendation] and grants Colonial Life's Motion for Summary Judgment on the retaliation claim.

II.

Initially, Diamond argues that we should remand her case to the district court so it can "reconsider" her retaliation claim. Brief of

Appellant at 18. Because Diamond failed to object

to the magistrate judge's disposition of her retaliation claim in his *second* report, the district court had no obligation to conduct a de novo review of the retaliation claim and Diamond waived her right to appellate review of that claim. *See Wells v. Shriners Hosp.*, 109 F.3d 198, 201 (4th Cir. 1997).

The Federal Magistrates Act requires a district court to "make a de novo determination *of those portions* of the [magistrate judge's] report or specified proposed findings or recommendations to which objection is made." 28 U.S.C.A. § 636(b)(l) (West 1993 & Supp. 2005) (emphasis added); *accord* Fed. R. Civ. P. 72(b) ("The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, *of any portion* of the magistrate judge's disposition to which *specific written objection has been made* . . . .") (emphases added). By contrast, in the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must "only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." Fed. R. Civ. P. 72 advisory committee's note.

We have long held that "the [Federal Magistrates] Act can[not] be interpreted to permit a party . . . to ignore his right to file objections with the district court without imperiling his right to raise the objections in the circuit court of appeals." *United States v. Schronce*, 727 F.2d 91, 93-94 (4th Cir. 1984); *see also Page v. Lee*, 337 F.3d 411,

416 n.3 (4th Cir. 2003). The Supreme Court has expressly upheld the validity of such a waiver rule, explaining that "[t]he filing of objections to a magistrate's report enables the district judge to focus attention on those issues — factual and legal — that are at the heart of the parties' dispute." *Thomas v. Arn*, 474 U.S. 140, 147 (1985). Absent such a rule, litigants would have little incentive to object in the district court, *Wells*, 109 F.3d at 200, and "any issue before the magistrate would be a proper subject of judicial review," *Thomas*, 474 U.S. at 148. The Magistrates Act does not contemplate such an obviously inefficient use of judicial resources: "Congress would not have wanted district judges to devote time to reviewing magistrate's reports except to the extent that such review is requested by the parties of otherwise necessitated by Article III of the Constitution." *Id.* at 153.

Here, Diamond filed an objection to the magistrate judge's disposition of her retaliation claim in his *initial* report and recommendation. But, as she concedes, the district court then ordered the magistrate judge to prepare a "new" report and recommendation and she failed to file an objection to the magistrate judge's recommended disposition of her retaliation claim in that "new" report. *See* Brief of Appellant at 15. Notwithstanding these concessions, Diamond argues that because the magistrate judge's second report was to be "new," in refusing to consider her retaliation claim afresh

the magistrate judge "did not do what [the district court] ordered him to do," and, thus, "[t]here [was] nothing" for Diamond "to object to." *Id.* at 16-17. For this reason, she maintains, her initial objection sufficed to trigger the district court's obligation to conduct a de novo review under the Magistrates Act and to preserve her appellate rights.

We must reject this argument. Despite her initial objection, when Diamond failed to lodge an objection to the magistrate judge's suggested disposition of her retaliation claim in his *second* report, she failed to make the "specific written objection" required to invoke de novo review by the district court. *See* Fed. R. Civ. P. 72(b). The fact that the record shows that the magistrate judge inaccurately characterized Diamond's brief as failing to address the retaliation claim does not relieve Diamond of her obligation to object to that error. By not objecting to the magistrate's mischaracterization of her brief, Diamond failed to put the district court on notice that she sought de novo review of the retaliation claim. As a result, just as Rule 72 and the Federal Magistrates Act contemplate, the district court did not "focus attention on [that] issue[ ]." *Thomas*, 474 U.S. at 147. In the absence of "specific written objection," the district court was free to adopt the magistrate judge's recommendation on the retaliation claim without conducting a de novo review, and Diamond "waive[d] [her] right to an appeal" on that claim. *See Wells*, 109 F.3d at 201.

Accordingly, we affirm the district court's grant

of summary judgment on Diamond's retaliation claim.

III.

Diamond's primary argument regarding her failure to promote claim is that to survive summary judgment she *only* needed to make

out a prima facie case of discrimination. She asserts that *Desert Palace* "makes it clear that . . . all Title VII cases are to be analyzed as mixed motive cases" and that the "shifting burden" test first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), "is actually an affirmative defense . . . and can not be used as a basis for dismissal of a Title VII case." Brief of Appellant at 19, 22. She further contends that in *Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277 (4th Cir. 2004) (en bane), we recognized that as a result of *Desert Palace* the "shifting burden" test no longer applies at the summary judgment stage and a plaintiff can "avert" summary judgment simply by establishing a "prima facie case" of discrimination. Brief of Appellant at 23-24.

Diamond also maintains, apparently in the alternative, that the district court erred in granting Colonial's motion for summary judgment because she established a prima facie case *and* showed that Colonial's reasons for refusing to promote her were pretextual. *See* Brief of Appellant at 28-30.

A

In 1991, after the Supreme Court had recognized that employment decisions motivated by both legitimate and discriminatory reasons — so-called "mixed-motive" decisions — are actionable under Title VII, *see Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (plurality opinion), Congress amended the Civil Rights Act to provide explicitly for liability in mixed-motive cases. *See* 42 U.S.C.A. § 2000e-2(m) (West 2003); *Desert Palace*, 539 U.S. at 94. Pursuant to the 1991 amendments (also known as the Civil Rights Act of 1991), a plaintiff succeeds on a mixed-motive claim if she "demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C.A. § 2000e-2(m). Once such a showing has been made, the employer cannot escape liability. However, through use of a limited affirmative defense, if an employer can demonstrate that it "would have taken the same action in the absence of the impermissible motivating factor," it can restrict a plaintiff's damages to injunc-

tive and declaratory relief, and attorney's fees and costs. 42 U.S.C.A. § 2000e-5(g)(2)(B).[2]

In the wake *of Price Waterhouse* and the 1991

Act, several courts of appeals, including this one, required Title VII plaintiffs to present *direct* evidence of discrimination to succeed on a mixed-motive theory. *See Desert Palace*, 539 U.S. at 95; *Taylor v. Virginia Union Univ.*, 193 F.3d 219, 232 (4th Cir. 1999) (en banc). In *Desert Palace*, however, the Supreme Court abrogated these holdings, concluding on the basis of the plain language of § 2000e-2(m) that "direct evidence of discrimination is not required in mixed-motive cases." 539 U.S. at 101-02. As in criminal cases and other civil cases, the Court held, circumstantial evidence is sufficient. *Id.* at 99-100.

Diamond argues that the *Desert Palace* holding means that all employment discrimination cases should be analyzed as mixed-motive cases[3] and that Title VII plaintiffs can survive summary judgment simply by presenting a "prima facie case." She further argues

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[2]Congress enacted § 2000e-5(g)(2)(B) in part to reject the holding of *Price Waterhouse*, 490 U.S. at 258 (plurality opinion), that an employer could avoid liability entirely by proving that it would have made the same decision even if it had not taken the impermissible factor into account. *See* H.R. Rep. No. 102-40(1), at 45-46 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 583-84 (stating that, because of this holding, "[t]he effectiveness of Title VII's ban on discrimination on the basis of race, color, religion, sex or national origin has been severely undercut").

[3]Diamond also contends that she pleaded a mixed-motive, and not a single-motive, claim. But her complaint does not specify whether she asserts that Colonial refused to promote her because of both legal and discriminatory reasons or solely because of illegal discrimination. Whether Diamond pled a mixed-motive claim is irrelevant, however, because "a case need not be characterized or labeled at the outset. Rather, the shape will often emerge after discovery or even at trial. Similarly, the complaint itself need not contain more than the allegation that the adverse employment action was taken because of a protected characteristic." *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 856 n.7 (9th Cir. 2002) (en banc) (citing *Price Waterhouse*, 490 U.S. at 247 n.12 (plurality opinion)), *aff'd*, 539 U.S. 90 (2003). Moreover, as explained within, Colonial was entitled to summary judgment regardless of whether Diamond asserted a mixed-motive or single-motive claim.

that our en banc decision in *Hill* recognized this dual effect of *Desert Palace*. These arguments are meritless.

As we explained in *Hill*, a Title VII plaintiff may "avert summary judgment. . . through *two* avenues of proof." 354 F.3d at 284 (emphasis added). A plaintiff can survive a motion for summary judgment by presenting direct or circumstantial evidence that raises a genuine issue of

material fact as to whether an impermissible factor such as race motivated the employer's adverse employment decision. *Id.* Pursuant to the 1991 Act, the impermissible factor need not have been the sole factor. As long as it motivated the adverse action, the plaintiff can establish an unlawful employment practice. *See 42* U.S.C.A. § 2000e-2(m). Alternatively, a plaintiff may "proceed under [the *McDonnell Douglas]* 'pretext' framework, under which the employee, after establishing a prima facie case of discrimination, demonstrates that the employer's proffered permissible reason for taking an adverse employment action is actually a pretext for discrimination." *Hill,* 354 F.3d at 285.

In establishing this pretext framework, the Supreme Court explained that the "broad, overriding interest" of Title VII, "shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions." *McDonnell Douglas,* 411 U.S. at 801. The pretext framework advances that interest by "compensat[ing] for the fact that direct evidence of intentional discrimination is hard to come by." *Price Waterhouse,* 490 U.S. at 271 (O'Connor, J., concurring in the judgment).[4] The Supreme Court constructed the elements of the prima facie case to give plaintiffs who lack direct evidence a method for raising an inference of discrimination. *See Texas Dep't of Cmty.*

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[4]In the event that a plaintiff has direct evidence

of discrimination or simply prefers to proceed without the benefit of the burden-shifting framework, she is under no obligation to make out a prima facie case. *See, e.g., Costa*, 299 F.3d at 855. Indeed, the *McDonnell Douglas* framework is of little value when direct evidence of discrimination is available. *See Price Waterhouse*, 490 U.S. at 271 (O'Connor, J., concurring in the judgment) (noting that the Supreme Court has suggested that the burden shifting framework is inapplicable where a plaintiff presents direct evidence of discrimination).

Affairs v. Burdine, 450 U.S. 248, 253-54 (1981); *Costa*, 299 F.3d at 855. But, once an employer rebuts the prima facie case with a legitimate, nondiscriminatory reason for the employment action, "the *McDonnell Douglas* framework — with its presumptions and burdens — disappear [s], and the sole remaining issue [is] discrimination *vel non*." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43 (2000) (internal quotation marks and citations omitted). Thus, in Title VII cases, the "prima facie case," a mechanism peculiar to the pretext framework, is never by itself sufficient to permit a plaintiff to escape an adverse summary judgment ruling except in the rare instance when an "employer is silent in the face of the presumption" it raises. *See Burdine*, 450 U.S. at 254.[5] Even then, of course, as in every employment discrimination case alleging disparate treatment, "[t]he ultimate burden of persuading the trier of fact that the defendant

intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.* at 253.

B.

Applying these governing principles to the case at hand, we must affirm the grant of summary judgment to Colonial because whether Diamond alleges that race was a motivating factor or the sole reason for Colonial's decision not to promote her, she has failed to raise a genuine issue of material fact as to the ultimate question, i.e., whether Colonial intentionally discriminated against her.

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[5]Not withstanding our clear recognition in *Hill* of these principles and the continued vitality of the *McDonnell Douglas* framework, Diamond insists that after *Desert Palace* that framework is "no longer a tool which can be used to dismiss a Title VII case at the [s]ummary [j]udgment stage." Her argument finds no support in the text of *Desert Palace*, which does not even mention *McDonnel Douglas*. Moreover, since deciding *Desert Palace*, the Supreme court has continued to invoke the burden-shifting framework in pretext cases. *See Raytheon Co. v. Hernandez*, 124 S. Ct. 51, 517 n.3, 518(2003); *see also Johnson v. California*, 125 S. Ct. 2410, 2418 n.7 (2005) Our sister circuits have also rejected the view that *Desert Palace* nullified the *McDonnel Douglas* framework. See, e.g., *Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 340 (5th Cir.2005); *Strate v. Midwest Bankcentre, Inc.*, 398 F.3d 1011, 1018 (8th Cir. 2005); *Cooper v. Southern Co.*, 390 F. 3d

695, 725 n.17 (11th Cir. 2004).

The magistrate judge and the district court disagreed as to whether Diamond had established that she was qualified for the position and, thus, whether she had made out a prima facie case of race discrimination. Diamond argues at length that she was qualified to be an accident and health manager, noting both that she had a college degree and had been in her position for 18 months while other applicants had not. For purposes of this appeal, we will assume that Diamond was qualified and made out a prima facie case of race discrimination. *Cf. Burdine*, 450 U.S. at 253 ("The burden of establishing a prima facie case . . . is not onerous."). But a prima facie case alone is not sufficient to warrant reversal of the district court's summary judgment ruling because Colonial has asserted legitimate, nondiscriminatory reasons for not promoting Diamond, specifically, that based on a multi-factored rating system, two managers — Hamrick, a white woman, and Chisholm, an African-American woman — rated Scott the best candidate, and Glover, the African-American assistant vice president of the claims department, agreed with that assessment.

Diamond claims that Colonial's failure to "recognize [her] prior experience as management experience should be considered evidence of discriminat[ory] intent," and that this evidence is sufficient to show that Colonial's stated reasons for not promoting her were a pretext for discrimination. Brief of Appellant at 28. We disagree. Assuming

arguendo that Diamond had more management experience than Scott and that Colonial failed to recognize the extent of Diamond's experience, we are unable to conclude that Diamond has demonstrated pretext. According to the stated qualifications for the accident and health manager position, some prior management experience was "preferred," but such experience was not regarded as essential. Thus, while management experience was a factor to be considered in awarding the promotion, it clearly was not intended to be dispositive.

To demonstrate a prima facie case of racial discrimination in a failure to promote case, a plaintiff must show that: "(1) she is a member of a protected group, (20 she applied for the position in question, (3) she was qualified for that position, and (4) the defendant rejected her application under circumstances that give rise to an inference of unlawful discrimination." *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248,268 (4th Cir. 2005).

Moreover, Diamond has failed to rebut the reasons documented in contemporaneous notes as to why Colonial awarded the promotion to Scott. *Cf. EEOC v. Sears Roebuck and Co.*, 243 F.3d 846, 852-53 (4th Cir. 2001). That is, she has failed to address the fact that on each of the nine factors considered by Hamrick and Chisholm — "operations knowledge, business

sense, decision making, communication skills, high degree of initiative, flexibility/openness, leadership skills, hands-on manager, and interpersonal skills" — Scott scored higher than Diamond, and each manager to review their applications, including two African-Americans, agreed that Scott was the superior candidate.

Diamond does not suggest any flaw in the rating system or that Hamrick and Chisholm failed to conduct fair evaluations. Nor does she contest the results of those evaluations. Thus, even if we assume that Diamond had more management experience than Scott, in the face of Colonial's nondiscriminatory — and unanswered — explanation for not promoting her, we must conclude that Diamond has failed to forecast sufficient evidence of pretext to "avert[ ] summary judgment" in Colonial's favor. *Hill*, 354 F.3d at 285.

IV. For the foregoing reasons, the judgment of the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

ROVILMA DIAMOND,	)c.a. 02-1412-03-17BC
	)
Plaintiff,	)
	) ORDER GRANTING IN
COLONIAL LIFE &	) PART DEFENDANT'S
ACCIDENT INSURANCE CO.	) MOTION FOR
	) SUMMARY
Defendant.	) JUDGMENT

This matter is before the court on the defendant Colonial Life and Accident Insurance Company's ("Colonial Life's") Motion for Summary Judgment. The plaintiff, Rovilma Diamond ("Diamond"), alleges in her complaint that Colonial Life discriminated against her on the oasis of her race in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S .C. § 2000e *et seq.*, and 42 U.S.C. § 1981. Diamond further alleges that she was retaliated against in violation of Title VII and §1981. Finally, Diamond alleges Colonial breached a contract with her in violation of South Carolina state law.

After reviewing the Magistrate Judge's Report and Recommendation ("R & R") and the parties' responses thereto, the court agrees with the Magistrate Judge's conclusion[1] that Colonial Life is entitled to judgment as a matter of law on the Title VII and § 1981 claims for discrimination and retaliation.

[1] Although the court agrees with the Magistrate Judge's conclusion, it does so based on a slightly different analysis as explained below. Accordingly,

Colonial Life's Motion for Summary Judgment is granted as to the federal claims and the remaining state law claim for breach of contract is remanded to state court.

I. PROCEDURAL HISTORY

Diamond filed her complaint in the Richland County Court of Common Pleas on April 20, 2002. Colonial Life removed the action to this court on April 30, 2002. On My 15, 2002, Colonial filed an amended answer and asserted counterclaims for conversion and breach of Colonial Life's employee Code of Conduct. On March 27, 2003, this court dismissed the counterclaims without prejudice.

On April 1, 2003, Colonial filed the instant Motion for Summary Judgment. This motion was referred to the Magistrate Judge. The Magistrate issued an initial Report and Recommendation ("R & R") on October 21, 2003, recommending that Colonial Life's Motion for Summary Judgment be granted as to the federal claims for discrimination and retaliation. In her response to the Magistrate's R & R, Diamond argued that the United States Supreme Court's recent decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), had radically changed the manner in which employment discrimination cases should be analyzed, and rendered the Magistrate Judge's R & R incorrect.

On January 21, 2004, this court referred the matter back to the Magistrate Judge for further consideration in light of *Desert Palace*. The Magistrate Judge had the parties submit further memoranda regarding any effect the *Desert Palace* decision may have had on the employment discrimination landscape. After hearing oral argument on March 24, 2004, the Magistrate Judge

issued a second R & R on June 10, 2004, again recommending that the Colonial Life's Motion for Summary Judgment be granted as to the federal claims. Diamond filed an objection to the R & R on June 24, 2004, and Colonial Life filed a response to Diamond's objection on July 12, 2004.

D. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). It is well established that summary judgment should be granted "only when it is clear that there is no dispute concerning either the facts of the controversy or the inferences to be drawn from those facts." *Pulliam v. Co. v. Cameo Properties*, 810 F.2d 1282, 1286 (4th Cir. 1987).

The party moving for summary judgment has the burden of showing the absence of a genuine issue of material fact, and the court must view the evidence before it and the inferences to be drawn therefrom in the light most favorable to the nonmoving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). When the defendant is the moving party and the plaintiff has the ultimate burden of proof on an issue, the defendant must identify the parts of the record that demonstrate the plaintiff lacks sufficient evidence. The nonmoving party, here the plaintiff, must then go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see also Celotex Corp. v. Catrett*, 477 U.S.

317 (1986).

A party "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Seals v. Hardy,* 769 F.2d 213, 214 (4th Cir. 1985). Therefore, "[m]ere unsupported speculation... is not enough to defeat a summary judgment motion." *Ennis v. National Ass 'n of Bus. & Educ. Radio, Inc.,* 53 F.3d 55, 62 (4th Cir. 1995).

I. DISCUSSION

A. Remaining Claims

As an initial matter, although Diamond's complaint alleges Colonial Life failed to promote her to Training Manager and to Accident and Health Manager, it appears that Diamond has abandoned her claim relating to the Training Manager position. In her memorandum in opposition to summary judgment, Diamond concedes that she was not the most qualified applicant for the position of Training Manager.

hi addition, in the June 10, 2004 R & R, the Magistrate Judge observed that although Diamond asked in her objections to the initial October 1, 2003 R & R that summary judgment be reconsidered for both the discrimination and retaliation claims, in her most recent memorandum she argues only that her failure to promote claim survives summary judgment. This court notes that Diamond did not dispute that Magistrate Judge's observation in her response to the June 10, 2004 R & R and thus this court adopts the reasoning contained in the initial R & R and grants Colonial Life's Motion for Summary Judgment on the retaliation claim.

In sum, the only remaining claim (excluding the breach of contract claim based on South Carolina

state law) is the failure to promote claim related to the Accident and Health Manager position.

B. The Effect of Desert Palace

After reviewing the text *of Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), the cases interpreting and applying it, and the briefs submitted in connection with this motion addressing any effect it may have on this litigation, the court finds that the Supreme Court's limited holding in *Desert Palace* has little or no bearing on the analysis of this case. As explained in the Magistrate's second R & R, in *Desert Palace*, the United States Supreme Court held that a plaintiff proceeding under a mixed-motive theory of discrimination is not required to establish his or her prima facie case by *direct evidence*. Prior to the *Desert Palace* decision, some courts required a plaintiff to present direct evidence (i.e., "substantial evidence of conduct or statements by the employer directly reflecting discriminatory animus," see *Costa v. Desert Palace, Inc.*, 268 F.3d 882, 884 (9th Cir. 2001)) in order to be afforded a mixed-motive instruction. The Supreme Court, pointing to the "unambiguous" language of 42 U.S.C. § 2000e-2(m),[2] held that no such requirement was warranted.

In its first *post-Desert Palace* decision on employment discrimination, the United States Court of Appeals for the Fourth Circuit discussed at length both the pretext framework and the mixed-motive theory of unlawful discrimination. *See Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d 277 (4th Cir. 2004). The Fourth Circuit, recognizing that *Desert Palace* removed the burden of proving a mixed-motive case by direct evidence, held that "[r]egardless of the type of evidence offered by a plaintiff as support for her

discrimination claim (direct, circumstantial, or evidence of pretext), or whether she proceeds under a mixed-motive or single-motive theory, '[T]he ultimate question in every employment discrimination case involving a claim of disparate

[2] Section 2000e-2(m) is the portion of the Civil Rights Act of 1991 that explicitly addresses the mixed-motive situation. According to this section, "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin *was a motivating factor* for any employment practice, even though other factors also motivated the practice." When a plaintiff proves a claim under this provision, the defendant then has the opportunity to establish a limited affirmative defense that restricts the plaintiff s available remedies to declaratory relief, certain types of injunctive relief, and costs and attorney's fees. *See 42* U.S.C. § 2000e-5(g)(2)(B).

treatment is whether the plaintiff was the victim of intentional discrimination.'" *Hill*, 354 F.3d at 286 (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153 (2000)). This court agrees with the Magistrate Judge that it is implicit in the *Hill* decision that the pretext framework and the mixed-motive analysis remain valid and that the holding *of Desert Palace* applies not only to jury instructions, but to the summary judgment state as well. As for this case, since Diamond is not alleging a mixed-motive theory, *Desert Palace* is inapposite.

C. Failure to Promote

Diamond alleges she was discriminated against on the basis of race in violation of Title VII and § 1981[3] when she was denied a promotion to Accident and Health Manager. Pursuant to Title VII, it is "an unlawful employment practice for an employer - (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin ...." 42 U.S.C. § 2000e-2(a)(l).

In order to establish a prima facie case of discriminatory failure to promote, a plaintiff is required to show that:

A. she is a member of a protected group;

B. she applied for the position in question;

C. she was qualified for the position; and

[3] The court's analysis for establishing claims of employment discrimination under either Title VIE or § 1981 is the same. *See Gairola v. Commonwealth ofVa. Dep't of Gen. Servs.*, 753 F.2d 1281,1285-86 (4th Cir. 1985). The analysis that follows, although couched in terms of Title VII, is equally applicable to Diamond's § 1981 claim.

D. she was rejected for the position in favor of someone not a member of a protected group under circumstances giving rise to an inference of unlawful

discrimination.

Alvarado v. Bd. ofTrs. of Montgomery Cmty. Coll., 928 F.2d 118,121 (4th Cir. 1991). There is no dispute that the first three requirements are met: (1) Diamond is an African-American; (2) she applied for the position of Accident and Health Manager; and (3) she was qualified for the position. As for the fourth requirement, Diamond alleges that this element is met because the person ultimately hired for the position, Cindy Scott ("Scott"), a white woman, was less qualified than Diamond. Colonial Life, in arguing that it had a legitimate, non-discriminatory reason for hiring Scott over Diamond, maintains that Scott was the more qualified applicant. This court finds that because Scott was equally qualified, if not more qualified, than Diamond for the Accident and Health Manager position, Diamond has failed to establish that she "was rejected for the position .. . under circumstances giving rise to an inference of unlawful discrimination."[4] Clearly, if Diamond is not more qualified than Scott, there are no circumstances giving rise to an inference of unlawful discrimination and the plaintiff has failed to establish a prima facie case.

The record reveals two Colonial Life employees, Debbie Hamrick ("Hamrick") and Blanche Chisolm ("Chisolm"), an African-American, interviewed six candidates for the Accident

[4] Although it may initially appear that the court has taken a different position than the Magistrate, a closer look reveals that the distinction is more form than substance. Because this court finds that Colonial Life's legitimate, non-discriminatory reason for

making the employment decision to hire Scott over Diamond directly contradicts Diamond's allegation that the circumstances of the employment decision give rise to an inference of discrimination, this court finds that Diamond has failed to set forth a prima facie case of discrimination. The Magistrate, on the other hand, accepted Diamond's allegation that she was more qualified for purposes of determining whether a prima facie case had been established. Both this court and the Magistrate agree that there is nothing in the record to indicate that Diamond was more qualified for the Accident and Health Manager position than Scott. If Colonial Life had alleged a legitimate, non-discriminatory reason *wholly independent from Diamond's and Scott's qualifications*, this court would have concluded that the prima facie case had been established.

and Health Manager position. Of these six, only the four with experience in the Claims Department (which included both Scott and Diamond) were seriously considered. After each candidate was interviewed, Hamrick and Chisolm discussed the interview out of the candidate's presence and filled in a "rating form." On this form, Hamrick and Chisolm rated each of the candidates in nine different areas. A candidate could receive a maximum of five points for each of the nine areas, thus a maximum score was 45.

After filling in the rating form, Hamrick and Chisolm consulted the candidates' managers to see if they disagreed with any of the ratings. The managers agreed with Hamrick and Chisolm. Of the four candidates, Scott received the highest score (41), and Diamond received the lowest (30).

The stated "Qualifications" for the position of Accident and Health Manager were as follows:

> Prior management experience preferred
> College degree preferred, but will consider equivalent claims experience
> Understanding of Colonial Products, Services, Markets, etc.

Diamond was more qualified in terms of education; she had a four-year degree and a master's degree in public administration. Scott, however, while only having a two-year degree, was more qualified in terms of experience. She had worked as a specialist in the Complex Claims and Disability Benefits areas and had been an office manager before coming to Colonial Life. Scott's experience in Complex Claims was particularly valuable in developing her skills as a communicator, negotiator, and persuader. In addition, when working in Complex Claims, Scott communicated with lawyers and unhappy customers and developed a broader base of medical knowledge. Diamond had worked only in Disability Benefits and been a retail supervisor (but not a manager) before coming to Colonial Life.

Diamond cites Colonial Life's policy prohibiting employees from changing positions unless they had worked for at least 18 months at one position as further evidence that she was more qualified than Scott. While Diamond had been working at the same position for well over 18 months, Scott had been at her current position for only 6 months. While it appears that Colonial Life had such a policy, the record reflects that employees could receive permission to advance even when they had not yet spent 18 months at their current position and this permission was most likely to

be given if an employee was seeking to move from one job in the Claims Department to another job in the Claims Department. Based on a plain reading of the record, there is simply no basis to conclude that Scott was more qualified for the position than Diamond. Because Diamond cannot show that she was more qualified for the Accident and Health Manager position, there is no basis to infer an illegal discriminatory intent motivated Colonial Life's employment decision to hire Scott.

IV. CONCLUSION

The court notes that in analyzing Colonial Life's employment decisions, it is bound to refrain from acting as a super personnel department and should not second-guess Colonial Life's perceptions of an employees qualifications. *See Smith v. Univ. of North Carolina*, 632 F.2d 316, 345,46 (4th Cir. 1980); *see also Evans v. Techs. Applications & Servs. Co.*, 875 F. Supp. 1115, 1120 (D. Md. 1995), *aff'd*, 80 F.3d 954 (1996). Because there is nothing in the record to indicate that Diamond was the victim of intentional discrimination, the court grants Colonial Life's Motion for Summary Judgment on the federal claims under Title VII and § 1981 and remands the case to state court for further proceedings on the remaining breach of contract claim. IT IS SO ORDERED.

Joseph Anderson, Jr.
United States District Judge

August 2, 2004

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Supreme Court, U.S.
FILED
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No. 05-495

IN THE

Supreme Court of the United States

ROVILMA DIAMOND,

Petitioner,

v.

COLONIAL LIFE AND ACCIDENT INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court should grant certiorari in Petitioner's case of alleged race discrimination and retaliation, where the Petitioner waived her right to review of her retaliation claim; failed to present circumstantial evidence that raises a genuine issue of material fact as to whether an impermissible factor such as race motivated the Respondent's employment decision; and failed to rebut the legitimate non-discriminatory reasons for Respondent's employment decision.

CORPORATE DISCLOSURE STATEMENT

Respondent, Colonial Life & Accident Insurance Company, is a wholly-owned subsidiary of Colonial Companies, Inc.

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STATEMENT OF THE CASE

Petitioner filed a complaint on April 23, 2002, in the state court alleging race discrimination and retaliation in violation of Title VII of the Civil Rights Act and 42 U.S.C. § 1981 (West 2003). Respondent removed the case to federal court and moved for summary judgment. On October 21, 2003, the magistrate judge issued a report and recommendation in which he recommended granting Respondent's motion for summary judgment on both the race discrimination (failure to promote) and retaliation claims. Petitioner timely filed objections specifically objecting to his disposition of both claims. She also argued that the recent decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), rendered the "shifting burden test . . . no longer . . . applicable" in Title VII cases at the summary judgment stage.

The district court ordered the magistrate judge to: "take a fresh look" at the lawsuit "in light of *Desert Palace*." Briefs were filed by both parties addressing the impact of *Desert Place*.

On June 10, 2004, the judge issued his second report and recommendation, again recommending that summary judgment be granted as to both claims. The judge states that "only Diamond's failure to promote claim will be addressed." Diamond timely objected to the magistrate's recommendation as to the discrimination claim, but did not file an objection to the report's treatment of her retaliation claim.

The district court conducted a *de novo* review of the discrimination claim and granted summary judgment on that claim. The court also granted summary judgment as to the retaliation claim but did not review the matter *de novo*

because the court concluded that Diamond had not preserved an objection to the magistrate judge's resolution of the claim.

Diamond appealed the granting of summary judgment to the Fourth Circuit Court of Appeals. The Fourth Circuit affirmed the judgment of the district court. The appeals court held that Diamond had failed to lodge an objection to the magistrate judge's suggested disposition of her retaliation claim in his second report. Although the Court of Appeals found that the judge had mischaracterized Diamond's brief, Diamond failed to put the district court on notice that she sought *de novo* review of the retaliation claim.

The Fourth Circuit also rejected Diamond's assertion that because of *Desert Palace*, the shifting burden test is no longer appropriate but only a *prima facie* case is required to demonstrate liability. The court also found that Diamond failed to forecast sufficient evidence of pretext. Summary judgment was affirmed as to the discrimination claim.

STATEMENT OF THE FACTS

Diamond informed Glover in August 2000 that she would like to be considered for the newly posted opening of Accident and Health Manager (A&H Manager) within the Claims Department. Two Caucasian employees, Areheart and Morgan, also expressed an interest. Because of budget issues the position was not filled at this time.

In January 2001, Diamond began to look outside Colonial for employment.

In February 2001, the A&H Manager position was again posted. Glover informed the hiring manager, Debbie Hamrick

(Caucasian), of the three employees who had earlier express interest. There were a total of six applicants and, of these, six were interviewed.[1] Hamrick was assisted in this process by Blanche Chisholm (African-American) and currently an A&H Manager. Hamrick and Chisholm together interviewed the six candidates.

After each interview, Hamrick and Chisholm discussed each applicant and rated him/her in nine categories: operations knowledge, business sense, decision making, communication skills, high degree of initiative, flexibility/ openness, leadership skills, hands-on manager, and interpersonal skills. Following every interview, the two would discuss the last applicant and come to an agreement as to his/her ratings on the chart of qualifications they created. Hamrick used the resulting points on the chart to rank the applicant as the information reflected a summary of the whole application process. At the end, only four of the applicants were considered worthy of serious consideration. Of those, Cindy Scott was the highest rated applicant. Diamond was fourth.

Hamrick followed the interviews by speaking to the managers of each of the four applicants given serious consideration. She also shared the ratings with each manager to see if there was any disagreement. Not one of the managers of any of the four individuals disagreed with the ratings of Hamrick and Chisholm. Hamrick also discussed her thoughts

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1. In addition to Diamond, and the two Caucasians who had originally expressed interest (Areheart and Morgan), the applicants were Cindy Scott (Caucasian), Rick Funderburk (Caucasian), Joe Peeples (Caucasian), Norman Ozark (Caucasian), and Fred Adkins (Caucasian).

with Glover prior to making a decision and he agreed with her assessment. Diamond felt that Glover was very supportive of her application. Scott was offered the position on March 15, 2001.

Hamrick, with the concurrence of Chisholm and Glover, found Scott to be the most qualified applicant. Diamond raises issues with regard to Scott meeting minimum requirements. The 19-month in-position requirement can be waived. The requirement was waived for Scott because the promotion was within the same department in which Scott already worked. The minimum qualifications for the A&H Manager also listed a college degree *or equivalent claims experience*. Hamrick credited *both* Scott and Diamond with having management experience prior to working at Colonial.

In the final analysis, Hamrick looked at the information that she had to indicate what each of the candidates would bring to the position. She looked at the results each had produced while at Colonial. Diamond admits that Hamrick told her that the issue was not how long someone had been in a position but about "the skills." Hamrick had been Diamond's manager at one point and Diamond felt that Hamrick was aware of what she could do.

Diamond filed an internal grievance because she was not promoted. At this time, Diamond began to claim that part of the reason that she was not promoted was retaliation for a statement she made to her supervisor, Stober, in support of Debra Goodman (African-American) who wanted to telecommute. Goodman did not yet qualify to telecommute, but Stober and Glover were working with her toward that end. Goodman later filed an administrative charge of discrimination. Stober asked Diamond if she could see how

Goodman felt like she was being discriminated against. Diamond responded that she could. Although Diamond is now willing to offer much detail, she repeatedly admits that she had no first-hand knowledge of what was happening with Goodman. Goodman's eventual litigation was dismissed on summary judgment.

Diamond alleges that she suffered a host of retaliatory conduct upon filing her charge and, thus, filed a second charge of discrimination on November 28, 2001. Diamond alleges that she suffered any number of retaliatory actions including monitoring her telephone, not giving her time to prepare for a one-on-one meeting, logging her attendance, and watching her more closely than other Seniors and the like.

All employees in Diamonds unit had earlier been notified that their telephone calls could be subject to monitoring to ensure quality control and customer service. There is not evidence that this applied to Diamond alone.

Stober notified his unit in advance that he would be conducting one-on-one meetings with them over a seven-day period. Diamond expressed concern over her preparation time and Stober explained that it was not a formal review, but simply a question-and-answer session for day-to-day matters. Stober advised her of the topics and informed her that she need not prepare. Diamond does not claim to have suffered any negative effects as the result of the meeting.

During these meetings, Stober talked with claims specialists who were supervised by either Diamond or another Senior. He asked for feedback on *both* Seniors' performances. Diamond felt Stober was eliciting negative information. However, he was seeking feedback on both Seniors.

REASONS FOR DENYING THE PETITION

I. The Petition Does Not Satisfy This Court's Requirements For Granting Certiorari.

Supreme Court Rule 10 provides that "[a] petition for writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10 lists the following examples of types of cases in which the Court may grant certiorari.

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to the call for an exercise of this Court's supervisory power;
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> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
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> (c) a state court or United States court of appeals has decided an important issue of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Id. Conversely, Rule 10 expressly states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

Diamond's Petition should be denied because there are no "compelling reasons" for granting certiorari in this case. This case does *not* involve (1) a conflict among the United States courts of appeals, (2) a conflict between a United States court of appeals and a state court of last resort, (3) a conflict on an important federal question among state courts of last resort, or (4) a conflict between this Court's decisions and the decisions of lower courts. Rather, this case involves nothing more than a claim of alleged employment discrimination and retaliation. Moreover, the asserted error in this case consists of nothing more than allegations of erroneous factual findings or general misapplication of the law. Those are precisely the types of allegations that Rule 10 provides are not appropriate for certiorari. Accordingly, the petition for writ of certiorari should be denied.

II. The Petition Fails On The Merits.

A. *Diamond Failed To Preserve Her Objection As To The Issue of Retaliation*

The district court properly found that Diamond had failed to preserve the issue of retaliation for its *de novo* appeal. Although Diamond raised an initial objection, she failed to lodge an objection to the magistrate judge's suggested disposition of her retaliation claim made in his second report. Diamond failed to make the "specific written objection" required to invoke *de novo* review by the district court. *See* Fed. R. Civ. P. 72(b). Even though the magistrate judge